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Vito Todaro and Guiseppe Fontana v. J. D. Gardner : Brief of Appellants

Utah Supreme Court

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In the Supreme Court of the State of Utah

VITO TODARO and GUISEPPE
FONTANA,

Appellants,

vs.

J. D. GARDNER,

Respondent.

Case No. 8239

BRIEF OF APPELLANTS

FILED

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BENJAMIN SPENCE
Attorney for Appellant

1401 Walker Bank Bldg.,

Clerk, Supreme Court, Utah Salt Lake City, Utah

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BRIEF OF APPELLANTS

STATEMENT OF FACTS

On February 20, 1948, the Respondent filed his complaint in the Superior Court of the State of Arizona, in and for the County of Maricopa, (Exhibit P-14) wherein he alleges that on the 28th day of June 1947 he loaned to appellants the sum of \$5,000.00, and in his second cause of action in said complaint contained he sets forth and alleges the particulars under which he allegedly loaned the Appellants said \$5,000.00.

The appellants filed their answer and later an amended answer to said complaint, denying the loan, but alleging that the respondent entered into an agreement with the appellants to purchase a certain motel of the appellants located in Arizona and attached to said (Exhibit P-14) is the agreement proposed but not signed by said parties.

The matter went to trial in said Superior Court, and at the conclusion of evidence, judgment was entered in favor of respondent, J. D. Gardner, and against the appellants herein for said sum of \$5,000.00.

Appellants herein then appealed to the Supreme Court of Arizona, and said judgment of the Superior Court of Maricopa County was reversed and the cause remanded to the trial court with directions to enter judgment for the defendants, (appellants herein) (Exhibit P-18).

Pursuant to the mandate of the Supreme Court of Arizona, the Superior Court of Maricopa County, Arizona, accordingly entered judgment in favor of the appellants herein and against the respondent herein for the sum of \$5,000.00 with interest at 6% per annum from June 27, 1949 until paid together with accruing costs until paid, in the sum of \$247.55 (Exhibit A).

On January 18, 1952 the appellants herein filed an action in the District Court of the Third Judicial District, in and for Salt Lake County, State of Utah, against the respondent herein upon the judgment of the Superior Court of Maricopa County, Arizona, and that the same had not been paid (R-1).

The responden, J. D. Gardner, filed his answer to said complaint, (R-4), admitting the allegations of paragraphs 1 and 2 of said complaint and admitting that on the 5th day of July 1951, an action was pending in the court of said Maricopa County, Arizona between said parties and that said parties had appeared in said action in person and by counsel and denies the other allegations of paragraph 3 of said complaint, and further denying that the defendant therein, (respondent herein) is indebted to appellants, herein and admits that no sum has been paid to appellants.

Respondent then interposes a "First affirmative defense" in which he alleges in substance that on the 28th day of June, 1947 he advanced to appellants herein the sum of \$5,000.00 to be used as a down payment on the purchase price of a motel upon the express conditions precedent that said money was only to be retained by the appellants herein if after further investigation the defendant, (respondent herein) was reasonably convinced that there was no risk involved to the operation of the property because of certain reasons he sets forth in his affirmative defense and that after investigation the respondent herein concluded that he would not go through with the agreement and that appellants were obligated to repay said \$5,000.00 to respondent herein (Tr. 4).

Pursuant thereto appellants herein filed a "Motion to Strike (Tr. 6), moving the court to strike from the answer of respondent herein said First Affirmative defense upon the grounds that said defense was not a pleadable defense to the complaint of the appellants herein, and that said affirmative defense does not state facts sufficient to entitle said respondent

herein to relief. Said motion was argued before the court and the appellants' herein motion to strike was denied (Tr. 8) and in due course the cause was set down for trial.

At the trial of the cause and after the appellants rested their case the respondent herein proceeded to introduce evidence in support of his affirmative defense, which evidence was timely objected to by appellants herein, upon the grounds that such evidence is not a pleadable defense to this action and that it does not state facts sufficient to entitle the defendant to any relief and that such matters are res adjudicata and same cannot be gone into as a set-off or counterclaim or otherwise, and that the court is not permitted to go into the merits of such a defense and that the court must give full faith and credit to the judgment of the State of Arizona. The court then overruled the objection and proceeded to trial (Tr. 16-17-18).

The court then took the matter under advisement and later rendered his decision in favor of the appellants herein for the sum of \$5,000.00 together with interest and court costs and directed counsel for appellants to prepare and file findings of facts and conclusions of law and judgment in accordance therewith (Tr. 90-90-91).

Respondent herein then files an objection to finding of fact and conclusion of law and judgment (Tr. 92). The matter was then argued and a brief of appellant was filed with the court on said matter which is contained in the exhibits but no mark of exhibit placed thereon. The court then took the matter under advisement and later reversed the court's decision and rendered judgment in favor of respondent for the sum

of \$5,000.00 and interest at 6% per annum from the 5th day of September, 1947 to the 2nd day of November, 1949 in the sum of \$647.50, and likewise rendered judgment in favor of the appellants herein for the sum of \$5,000.00 plus court costs in the sum of \$247.55, and concluded in the end that judgment for respondent should be in the net sum of \$399.95.

During the course of the trial and during the pre-trial it was agreed between counsel for the respective parties that pending the appeal of the cause of action in Arizona, the appellants herein had paid back to the respondent herein said sum of \$5,000.00 as is disclosed by paragraph 5 of the pre-trial order (Tr. 10).

STATEMENT OF POINTS

POINT I

THE COURT ERRED IN DENYING THE MOTION OF THE APPELLANT TO STRIKE FROM THE ANSWER OF THE RESPONDENT, THE RESPONDENT'S FIRST AFFIRMATIVE DEFENSE, AND THAT SAID ALLEGATIONS DO NOT STATE FACTS SUFFICIENT TO ENTITLE DEFENDANT TO RELIEF.

POINT II

THE COURT ERRED IN OVERRULING THE OBJECTION OF THE APPELLANTS TO THE INTRODUCTION OF ANY EVIDENCE OF THE RESPONDENT IN

SUPPORT OF RESPONDENT'S FIRST AFFIRMATIVE DEFENSE AND THAT SAID DEFENSE DOES NOT STATE FACTS SUFFICIENT TO ENTITLE RESPONDENT TO ANY RELIEF.

POINT III

THE COURT ERRED IN ENTERING JUDGMENT FOR THE RESPONDENT.

POINT IV

THE COURT ERRED IN ENTERING JUDGMENT FOR THE RESPONDENT FOR THE SUM OF \$5,000.00 AND INTEREST THEREON IN THE SUM OF \$647.50, OR A NET JUDGMENT OF \$399.95, AS A SET OFF OR COUNTERCLAIM OR OTHERWISE.

ARGUMENT

POINT I

THE COURT ERRED IN DENYING THE MOTION OF THE APPELLANT TO STRIKE FROM THE ANSWER OF THE RESPONDENT, THE RESPONDENT'S FIRST AFFIRMATIVE DEFENSE, AND THAT SAID ALLEGATIONS DO NOT STATE FACTS SUFFICIENT TO ENTITLE DEFENDANT TO RELIEF.

It is apparently the contention of the respondent herein, that the defense interposed by him in this action was apparently not adjudicated in the Courts of Arizona in the original action, inasmuch as Respondent proceeded upon the theory of a loan and the Supreme Court of Arizona reversed the judgment of the Superior Court on this theory, and the Respondent apparently now contends he has a right to interpose a defense or cause of action upon a different theory, which he apparently contends was not determined by the Arizona Courts.

It is the contention of the Appellant herein, in support of his appeal, that:

- (a) That the affirmative defense interposed by Respondent in his answer to the complaint of the Appellant is res adjudicata and Respondent cannot again interpose a defense which would go to the merits of the case.

30 American Jur. Page 919, Par. 175.

"The application of the doctrine of res judicata to identical causes of action does not depend upon the identity or difference in the forms of the two actions. A judgment upon the merits bars a subsequent suit upon the same cause, though brought in a different form of action, and a party therefore cannot, by varying the form of action or adopting a different method of presenting his cause, escape the operation of the principal that one and the same cause of action shall not be twice litigated. On the other hand, the fact that a different form or measure of relief is asked does not preclude the application of the judgment to estop the maintenance of the second action." Freeman on Judgments, 5th Ed. Par. 684, pp. 1443 and 1444.

30 American Jr. Page 920, Par. 178.

"It is a fundamental principle of jurisprudence that material facts or questions which were in issue in a former action, and were there admitted or judicially determined are conclusively settled by a judgment rendered therein and that such facts or questions become *res judicata*, and may not again be litigated in a subsequent action between the same parties or their privies, regardless of the form the issue may take in the subsequent action, whether the subsequent action involves the same or different form of proceeding, or whether the second action is upon the same or a different cause of action, subject matter, claim, or demand, as the earlier action. In such cases, it is also immaterial that the two actions are based on different grounds, or tried on different theories, or instituted for different purposes, and seek different relief." (See authorities in Note 19 thereof).

30 American Jur. Page 923, Par. 179.

"The phase of the doctrine of *res judicata* precluding subsequent litigation of the same cause of action is much broader in its application than a determination of the question involved in the prior action; the conclusiveness of the judgment in such case extends not only to matters actually determined, but also to other matters which could properly have been determined in the prior action. This rule applies to every question falling within the purview of the original action, in respect to matters of both claims, and defense, which could have been presented by the exercise of due diligence."

30 Am. Jur. Page 932, Par. 187.

"Notwithstanding the general rule that a judgment rendered in an action involving a cause of action differ-

ent from that involved in a subsequent action is not conclusive as to matters not litigated in the former action, there are many cases in which the doctrine of res judicata is held or declared to be applicable to defenses which were not raised, but which could properly have been considered and determined, in the prior action, so that if the defendant neglects to set up the defense, he is concluded as to the existence thereof by the judgment rendered in the action, even though the subsequent action involves a different cause of action. In support of the rule, it has been held that a judgment in favor of the plaintiff is in adjudication, not merely as to the existence of the plaintiff's cause of action, but, as to the non existence of any defenses thereto. In justification of the rule, it has been declared that a defendant should not be permitted to split his defense and present them by piecemeal in successive actions growing out of the same transaction, that there must be an end to litigation, and that where a party has an opportunity to present his defense and neglects to do so the demands of the law require that he take the consequences."

Stephani v. Abbott et al, 30 P. (2d) 1033. Calif.

"It is not the policy of the law to allow a new and different suit between the same parties concerning the same subject matter, that has already been litigated. Neither will the law allow the parties to trifle with the courts by piecemeal litigation. When plaintiff was brought into court by defendant in the former case, she certainly knew her rights. If she wished to rescind the contract, or if she had rescinded it, as she said in her answer she had done, then and there was the time to present her pleadings and evidence, and insist upon all rights to which she was entitled under the law. If she could not get the award of the law upon the facts in the lower court, she could have appealed. She did not do so. She is now met by the presumption that

all the facts and matters in controversy were disposed of in the former suit, and the further presumption that the judgment in the former suit is correct. If she failed to assert her claim properly, or to present the proper evidence in the first suit, she will not now be permitted in a second to litigate it. The principles herein stated are elementary."

Logan City vs. Utah Power and Light Co. 16 Pac. (2d) 1097,
Utah.

"It is well stated that it is the duty of a party to interpose such defenses as it may have to an action brought against it, and, if it fails to do so, the resulting judgment is conclusive against it as to all matters of defense which were or might have been interposed. And likewise a party to a judgment is not entitled to have it vacated merely because of the existence of certain matters of defense of which it fails to avail itself on the trial."

Logan City v. Utah Power and Light Co., 44 Pac. (2d) 698.
Utah.

"And such a judgment is final, not only as to the matter actually determined, but also as to every other matter which might have been litigated by the parties, as part of the subject in controversy, but which was omitted from the case through negligence, or inadvertence, or even accident."

Everill v. Swan, 20 Utah 56, 57 P. 716.

"These additional matters, relied upon in the answer and which were stricken therefrom, could have been set up in the former action, and, not having been pleaded in that case, the judgment became conclusive, as an adjudication between the parties, not only as to matters actually determined, but also as to every other

matter which might have been litigated by the parties as a part of the subject in controversy, but which was omitted from the case through negligence or inadvertence."

Peay vs. Salt Lake City, 11 Utah 331, 40 P. 206.

"The defendant can only be called upon to answer the material allegations of the complaint, and upon such allegations the issue is formed, and when judgment is rendered thereon by a court of exclusive jurisdiction, it is conclusive between the parties, upon the same matters, unless set aside by a court of last resort. And such a judgment is final, not only as to the matter actually determined, but also as to every other matter which might have been litigated by the parties, as part of the subject in controversy, but which was omitted from the case through negligence, or inadvertence, or even accident."

Gaskell et al vs. Wallace, 89 Pac. (2d) 687. Calif.

"It is equally well settled that a judgment rendered in a court of competent jurisdiction is res judicata not only on all questions actually litigated and decided, but on all others that might have been litigated in the action. A party is not permitted to split his demands or defenses. In Elm v. Sacramento Suburban Fruit Lands Co., 17 Pac (2d) 1003 this rule was thus announced:

"To this situation is clearly applicable the well established rule that matters in controversy in the actions upon which it is based, but also in all other actions involving the same question, and upon all matters involved in the issues which might have been litigated and decided in the case; the presumption being that all such issues were met and decided. (Cases cited). The judgment operates as res judicata, not only in regard

to the existence of the plaintiff's cause of action, but as to the nonexistence of the defense which was not pleaded."

For further authorities on this identical question see the following:

C. J. S. Vol. 50 Paragraph 657

Curtiss v. Crooks, 66 Pac. 2nd 1140. Washington.

Besore v. Metropolitan Trust Co. et al. 234 Pac. (2d) 296.

Bennett v. City of Salem et al. 235 Pac. (2d) 772. Oregon.

When the objection of the Appellant in this case to the introduction of any evidence in support of the affirmative defense of the Respondent was overruled, the court permitted to be introduced in evidence, among other exhibits, the motion of the Respondent for a rehearing before the Supreme Court of Arizona, which is designated as Exhibit P-15. In this motion the Respondent raises the very question that he pleads in his affirmative defense in this action and contends the court should have considered both of his theories raised by his complaint (Exhibit P-14) in his first and second causes of actions, and if the court will examine his complaint (Exhibit P-14) he pleads therein the very defense he interposes in this action, which the Appellant herein contends was fully determined and adjudicated in the former action. We quote from this motion:

"Comes now the Appellee in the above entitled appeal and respectfully moves the court for a rehearing upon the following grounds:

That the decision of the court is in error in holding that the action was one solely to recover money loaned, and in failing to consider the other theories of the

complaint, and in holding that the evidence was not sufficient to justify a recovery by the plaintiff, and in reversing the judgment of the lower court in favor of the plaintiff and against the defendants, for the reasons following:

1. The complaint set forth, in addition to a cause of action for money loaned, a good cause of action to recover a down payment made under a preliminary contract wherein no provision was made for the forfeiture of such down payment, and the parties had agreed that the plaintiff might rescind the contract and recover such down payment in the event his attorneys determined that the property being purchased was subject to certain Government regulations, as well as setting forth facts entitling plaintiff to recover said down payment on the theory of unjust enrichment; and

2. The evidence was sufficient to show that the amount sued for was loaned by plaintiff to defendants; and

3. The evidence did not show any agreement between the parties for a forfeiture of said down payment; and

4. The evidence was sufficient to show that said down payment was made under preliminary agreement as alleged in the complaint and that plaintiff had the right to thereunder rescind said contract and recover such down payment; and

5. The evidence was sufficient to show that plaintiff was entitled to recover said down payment under the theory of unjust enrichment, and:

6. That in view of the whole case, substantial justice was done by the lower court in entering judgment for the plaintiff and against the defendant.

"It is clear from the allegations of the complaint that there was a preliminary agreement between the

parties which the plaintiff could rescind under certain conditions, and that the sum of \$5,000 paid by plaintiff to defendants thereunder, was to be applied as a credit on the purchase price if the sale was consummated . . . Whether the transaction of the plaintiff paying the defendants \$5,000 under such an agreement is described as a loan or as a down payment is immaterial, since it is clear under the allegations that said sum was to be applied as a credit on the purchase price if the final contract of sale was consummated . . . Under the facts alleged, if the transaction did not constitute a loan, then certainly it constituted a down payment on the purchase price made under said preliminary agreement.

Further it is settled in this state that a party may set forth in his complaint two or more claims, regardless of consistency, and either in one count or in separate counts, and need not show on appeal that both theories were sustained by his evidence . . .

The court bases its decision upon the fact that the trial court entered judgment for the plaintiff on his first cause of action, for money loaned, rather than on the second cause of action which set forth the facts of a conditional agreement which was not consummated because the condition upon which it was based was not fulfilled.

The record before the court shows that there was never any requirement or demand made by the defendants for the plaintiff to elect which cause of action it desired to pursue and consequently under the doctrine of substantial justice we respectfully submit that the decision heretofore entered by this court be vacated and judgment entered in favor of the appellee, since on either cause of action he was entitled to prevail over the appellant."

I have quoted briefly from the motion of Respondent above referred to for the purpose of substantiating the position of the Appellant herein, that the very defense attempted to be interposed by the Respondent herein was both pleaded in his complaint before the Superior Court of Arizona, and the very question he raises by his motion for a rehearing before the Supreme Court of Arizona was ruled upon, by both courts, and his motion for a rehearing was denied. The case was remanded to the trial court with directions to enter judgment for the defendants (Appellants herein).

By the denial of the motion for a rehearing of the Respondent herein before the Supreme Court of the State of Arizona, every consideration was given by said court to the very contention the Respondent attempts to plead and prove in this case, and such denial of his said motion constitutes an adjudication of the merits of this case, and said Respondent cannot now interpose his affirmative defense, and retry the case before this court.

- (b) That said purported affirmative defense cannot be interposed in an action on a judgment as a set off or counterclaim.

30 Am. Jur. page 937, Par. 193.

"On the theory that matters which have once been fully investigated between the parties and determined by the court shall not again be contested, the doctrine of res judicata as to a cause of action which has been litigated has been held to prevail where such cause of action was attempted to be interposed as an offset in a subsequent action between the same parties. 77 N.E. 40, N.Y. 181 U.S. 117, 45 L ed. 776 3 L. R. A. NS 1042.

I quote the above for the reason that in the findings of fact in this case the court allowed a judgment for the Respondent as a set off and which the Appellant herein contends is an error of the court.

- (c) That the court is bound to conform to the full faith and credit clause of the Constitution of the United States in giving full faith and credit to the judgment of a sister state.

Thompson v. William Ede Co., 103 Pac. (2d) 530. Oklahoma.

"The action being one of a judgment of a sister state it was not open to re-examination upon its merits."

Reed vs. Hollister, 212 Pac. 367, Oregon.

"The right to enforce this judgment the force and effect to be given to it is protected and guaranteed by the Constitution of the United States. The courts of this state have no power to go behind it or to re-examine it upon its merits. On the contrary it is conclusive evidence of every matter properly adjudicated and is entitled to the same faith and credit in this state as in the state where rendered."

35 Am. Jur. Page 145, Par. 535.

"Under the full faith and credit clause of the Constitution of the United States, a judgment rendered by a court of one state is, in the courts of another state of the Union, binding, and conclusive, as to the merits adjudicated. It is improper to permit an alteration or re-examination of the judgment, or of the grounds on which it is based."

50 C. J. S. Page 493, Par. 891

"Under the full faith and credit clause of the Federal Constitution and the general rules discussed supra, a

final valid judgment on the merits rendered by a competent court having jurisdiction of the parties and the subject matter is conclusive in every other state and the merits cannot be reinvestigated. The full faith and credit clause of the Federal Constitution precludes any inquiry into the merits of the cause of action, the logical or consistency of the decision, or the validity of the legal principles, on which the judgment is based.

"A judgment in another state by a court having jurisdiction is conclusive not only as to all matters which were actually in issue and decided in that suit, or which were necessarily implied in, or to be inferred from the judgment, in the sense that the judgment could not have been rendered without the finding or determination of such matters, but also as to other matters, which the parties might have litigated and which might have been decided as incident to, or essentially connected with, the subject matter of the litigation within the purview of the original action, either as a matter of claim or of defense.

Roche v. McDonald, 275 U. S. 449, 72 L. Ed 365.

"It is settled by repeated decisions of this court that the full faith and credit clause of the constitution requires that the judgment of a State Court which had jurisdiction of the parties, and the subject matter in suit, shall be given in the courts of every other state the same credit, validity and effect which it has in the State where it was rendered, and be equally conclusive upon the merits; . . . and the judgment, if valid where rendered, must be enforced in such other State although repugnant to its own statutes."

Fidelity & Deposit Co. of Maryland vs. Clanton, 28 Pac. (2d) 566. Oklahoma.

"The obligation to accord full faith and credit to a valid judgment, other than for lack of jurisdiction

of the person or subject matter, or for the enforcement of a penalty, is without limitation. Also the constitutional and statutory provisions referred to protect a judgment of a court of a sister state against collateral impeachment."

The foregoing law is elementary, but we quote the foregoing for the reason of reference to the law, and for the further purpose that the judgment herein sued upon was never attacked by the Respondent for any irregularities, or grounds provided by law to impeach such a judgment, and the same is regular and not questioned.

POINT II

THE COURT ERRED IN OVERRULING THE OBJECTION OF THE APPELLANTS TO THE INTRODUCTION OF ANY EVIDENCE OF THE RESPONDENT IN SUPPORT OF RESPONDENT'S FIRST AFFIRMATIVE DEFENSE AND THAT SAID DEFENSE DOES NOT STATE FACTS SUFFICIENT TO ENTITLE RESPONDENT TO ANY RELIEF.

Without further discussion of the above point, we feel that the argument and the authorities set forth in Point 1 above covers the error of the court in overruling the objections of the Appellant herein to the introduction of any evidence on the part of the Respondent in support of his affirmative defense and permitting this case to be tried anew.

We do however respectfully request the court to examine the evidence as contained in Exhibit P-17 of this case, which

is a transcript of the evidence of the case as tried in the Superior Court of the State of Arizona in and for the County of Maricopa. There was no new evidence produced in the case before the lower court. It was substantially the same evidence that was introduced in the Superior Court of Arizona. This cannot be done, as the Respondent is precluded from trying this case again on the merits by reason of the law pertaining to res judicata, estoppel and the full faith and credit provision of the Constitution of the United States as is substantially set forth in the authorities hereinabove.

POINT III

THE COURT ERRED IN ENTERING JUDGMENT FOR THE RESPONDENT.

We anticipate that the Respondent will contend that the Court of Arizona did not adjudicate this matter fully and did not take into consideration the second theory of Respondent's cause of action, and that he has a right to interpose such a defense in this action on this judgment. We feel that what has been outlined by Appellants in their argument in support of Point I herein has fully covered this without elaborating more in support of Point III, we feel that the following is very enlightening and a determining factor in this matter:

50 C. J. S. Page 141, Page 686.

"A fact or question which was in issue in a former suit, and was there judicially passed on and determined by a domestic court of competent jurisdiction, is conclusively settled by the judgment therein, as far as concerns the parties to that action and persons in privity

with them, and cannot be again litigated in any future action between such parties or privies, in the same court or in any other court of concurrent jurisdiction, on either the same or different cause of action, while the judgment remains unreversed, unmodified, or unvacted by proper authority. This Doctrine of the conclusiveness of judgment is sometimes referred to alternatively as the doctrine of judicial estoppel, and, as judicially noted, it is simple and universally recognized in almost innumerable cases.

The force of the estoppel lies in the judgment itself; it is not the findings of the court or the verdict of the jury which concludes the parties, but the judgment itself entered thereon. Likewise the conclusiveness of an adjudication depends on the source from which it came and the issues it determined, and not on the violence of the controversy. The reasoning of the court in rendering a judgment forms no part of the judgment, with respect to its conclusiveness, nor are the parties bound by remarks made or opinions expressed by the court in deciding the cause, which do not necessarily enter into the judgment."

We respectfully submit that the District Court erred in entering judgment for the Respondent in this case. The judgment sued on in this case was never attacked by the Respondent, either in his pleadings or in his evidence and as long as the judgment of the Superior Court of Arizona, sued on herein, stands, the court was without authority to again try this case on the merits.

POINT IV

THE COURT ERRED IN ENTERING JUDGMENT
FOR THE RESPONDENT FOR THE SUM OF \$5,000.00

AND INTEREST THEREON IN THE SUM OF \$647.50,
OR A NET JUDGMENT OF \$399.95, AS A SET OFF OR
COUNTERCLAIM OR OTHERWISE.

Upon what theory the court found a judgment in the net sum of \$399.95 in favor of the Respondent and against the Appellant, we are unable to determine, (Tr. 93-94-95) other than the fact that the Appellant had the sum of \$5,000.00 in their possession for a short time after the judgment was entered in favor of Respondent in the Superior Court of Arizona. It was conceded by Respondent that the \$5,000.00 was returned to the Respondent by Appellants herein shortly after the judgment was rendered and such a finding was so made in the pre-trial of the lower court, Paragraph 5, (Tr. 10) and no issue was raised on that question, nor was any affirmative relief demanded or pleaded by Respondent, nor evidence introduced on this point. While there is nothing in the record of this case, either by way of evidence or pleadings with respect to interest being allowed on the \$5,000.00 in question, while it was in the possession of Appellants, the court concludes that the Respondent was entitled to interest. From what source the lower court concludes this we are unable to determine, and for that reason we respectfully submit it was not within the court's jurisdiction to make such a finding or conclusion or judgment in this respect.

Respectfully submitted,

BENJAMIN SPENCE
Attorney for Appellant
1401 Walker Bank Bldg.,
Salt Lake City, Utah